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In the Supreme Court of the United States

October Term, 1958

UNION PACIFIC RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

JURISDICTIONAL STATEMENT

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Law Briefs—OMAHA LINO-SLUG PRINTING CO., 418 So. 15th St.

INDEX

	Pages
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement	4
The Commission's Primary Administrative Jurisdiction	9
The Questions Are Substantial	13
Conclusion	26
Proof of Service	27

Cases Cited:

Boston & Maine Railroad Co. v. United States, —— U. S. ——, 79 S. Ct. 107	3, 14
Commodity Rates on Lumber and Other Forest Products, 165 I. C. C. 561	8
Detroit Traffic Asso. v. L. S. & M. S. Ry. Co., 21 I. C. C. 275	5
Director General v. Viscose Co., 254 U. S. 498	3, 14
Far East Conf. v. United States, 342 U. S. 570	3, 14
Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247	21
Quality Gas & Oil Co. v. Northern Pac. Ry. Co., 185 I. C. C. 395	5
Railroad Operating Regulations for the Movement of Loaded Freight Cars, 298 I. C. C. 371	15
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426	14
Transportation of Strawberries by Express, 81 I. C. C. 634	17
Transportation of Strawberries by Express, 151 I. C. C. 553	17
Transportation of Strawberries by Express, 156 I. C. C. 4	18
Union Pacific R. Co. v. U. S., 313 U. S. 450	2
United States v. Louis. & Nash. R. R., 235 U. S. 314	21
United States v. South Buffalo R. Co., 333 U. S. 771	2
United States v. Trucking Co., 310 U. S. 344	20

INDEX—Continued

Pages

U. S. v. Elgin, J. & E. Ry., 298 U. S. 492 2

U. S. Nav. Co. v. Cunard S. S. Co., 284 U. S. 474 ..... 3, 14, 16, 19

Statutes Cited:

Elkins Act, 49 U. S. C., §§ 41(1)-43 ..... 1, 2, 3, 11, 12, 14, 15, 16, 21, 24

Expediting Act, 49 U. S. C., § 45 2

Interstate Commerce Act, as amended, 49 U. S. C., §§ 1, et seq.:

Section 1(3)(a) 2, 8

Section 1(4) 2, 8

Section 1(5) 16

Section 1(6) 16

Section 1(10) 2, 18

Section 1(14) 2

Section 1(14)(a) 18

Section 1(15) 2, 18

Section 2 17

Section 3 17

Section 4 8

Section 6(1) 2, 8, 9, 17, 19

Section 6(7) 1, 2, 11, 12, 15, 17, 24

Section 15(1) 16

Section 15(7) 21, 22

Miscellaneous:

Interstate Commerce Commission Service Order No. 910, "Railroad Operating Regulations for the Movement of Loaded Freight Cars," dated March 19, 1956 ..... 15, 18

Investigation and Suspension Docket No. 7050, Lumber—Free Time Allowance at Hold Points 11, 13, 16, 22

Appendix A—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C., §§ 1, et seq., and Elkins Act, 49 U. S. C., §§ 41(1), 43.

Appendix B—Opinion of the United States District Court for Southern District of Iowa (including Findings of Fact, Conclusions of Law, Order Granting Summary Judgment and Order Granting Injunction).

In the Supreme Court of the United States

October Term, 1958

No._____

UNION PACIFIC RAILROAD COMPANY,
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UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Southern District of Iowa has not been officially reported. A copy (including Findings of Fact, Conclusions of Law, Order Granting Summary Judgment and Order Granting Injunction) is attached as Appendix B hereto.

JURISDICTION

This suit was brought by the United States of America under the act commonly known as the Elkins Act, 49 U. S. C. 41-43, to enjoin appellant from allegedly violating Section 6(7) of the Interstate Commerce Act (49 U. S. C. 6(7)) and Section 1 of the Elkins Act by performing, in order to compete with longer, circuitous routes, a slow or

delayed service for all shippers requiring such service, in transporting lumber at the same published tariff rates appellant and the circuitous routes charge for "normal" service in transporting lumber, without the time consumed in performing either the normal service or the slow service, or any *extra* charge for the slow service being specified in published tariffs. The summary judgment and injunction of the district court were entered on April 3, 1959, and notice of appeal was filed in that court by appellant on April 10, 1959. The district court has stayed and suspended the injunction until October 23, 1959. Jurisdiction of this Court to review this case on direct appeal is conferred by 49 U.S.C. § 45. The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *U. S. v. Elgin, J. & E. Ry.*, 298 U. S. 492; *Union Pacific R. Co. v. U. S.*, 313 U. S. 450; *United States v. South Buffalo R. Co.*, 333 U. S. 771.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 U.S.C.), Sections 1(3)(a), (4), (10), (14), (15) and 6(1) and (7), and of the Elkins Act (49 U.S.C.), Sections 41(1) and 43, involved in this appeal, are set forth in Appendix A hereto.

QUESTIONS PRESENTED

1. Whether, in view of its conclusion that "it is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved," and its finding of fact that after the complaint herein was filed, the Commission instituted and now has under consideration its own investigation concerning the lawfulness of slow or delayed service in the transportation of lumber by several other railroads (not including appellant) and will

make such findings and order as the facts may warrant, the district court erred in refusing to apply the settled rule of primary administrative jurisdiction applied by this Court in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Director General v. Viscose Co.*, 254 U. S. 498; *Far East Conf. v. United States*, 342 U. S. 570; *Boston & Maine Railroad Co. v. United States*, —— U. S. ——, 79 S. Ct. 107, and other cases, and, thereupon, to dismiss the complaint.

2. If question 1 is answered negatively, whether the district court erred in making the administrative decision, in effect, that appellant may not lawfully perform a slow or delayed transportation service for the same published tariff rates it charges for performing "normal" or fast service.

3. Whether, in view of its correct finding of fact that appellant's slow service is performed for *all* traffic of *all* shippers alike desiring slower than normal service, and the fact that appellant collects for the slower service, and retains the full "published and approved tariff rates," the district court erred in holding that appellant's offering and performing the slower service constitutes "a device for the offer and gift of rebates, concessions, advantages, and discriminations in violation of the Elkins Act" whereby lumber of shippers requiring the slower service is transported by appellant "at less than the published rates on file with the Interstate Commerce Commission."

4. Whether, since appellant concededly collects and retains for performing the slower service, the "published and approved tariff rates" lawfully on file with the Interstate Commerce Commission specifying the rates and charges for transporting lumber, the district court erred in enjoining defendant from performing the slower

service "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

5. Whether, in view of the fact that there is no provision of law or any order, rule or regulation of the Commission expressly requiring appellant to publish in its tariffs the speed or schedules of its trains or time it will consume in performing transportation service, the district court erred in holding that any intentional slow or delayed service offered by appellant must be published in tariff form, and that competitive necessity provides no legal defense to this action.

STATEMENT

For many years, under certain commercial marketing conditions and distribution methods, shippers of various commodities have required, and railroads have provided, flexibility and variation in train schedules and transit time for movement of commodities from place of production to final markets or places of consumption. It is an established practice of long standing in the shipping, distributing and marketing of commodities under certain market conditions for shippers to consign shipments to themselves to some intermediate point, deliver the shipments to railroads and start them on their way from point of production before they have found buyers for the commodities, and to search for buyers while the commodities are moving in the direction of and nearer to markets where the shippers know from experience that they will ultimately find buyers. (Such traffic is designated "transit" traffic in the complaint herein but it is more commonly called and will be referred to herein as "roller" traffic.) When a buyer is found, the shipper

gives a "reconsignment" or "diversion" order to the railroad having possession of the shipment, reconsigning or re-billing the shipment on the through rate to the newly found destination and buyer.

Reconsignment or diversion of traffic while in transit is an established commercial practice of long standing and is fully authorized by railroad tariffs duly filed and published with the Interstate Commerce Commission. The reconsignment or diversion privilege at the through rate is the "key" to this method or practice of transporting, distributing and marketing commodities. The practice has been long and well known to the Commission and has received its blessings. *Detroit Traffic Asso. v. L. S. & M. S. Ry. Co.*, 21 I. C. C. 257, at page 259.

Shippers of such "roller" traffic generally require a longer time for movement of such traffic than is normally required or desired if the buyer and ultimate destination of the shipment are known before the traffic moves from point of production or origin. To obtain such longer time in transit for such traffic shippers have for many years followed the established practice of routing such shipments over longer or circuitous routes over which, as in the instant case, their shipments move at the same tariff rates and charges at which they move over shorter routes. This practice of shippers in routing their "roller" traffic over longer circuitous routes to obtain more time in transit to enable them to find buyers has also received the Commission's blessing. *Quality Gas & Oil Co. v. Northern Pac. Ry. Co.*, 185 I. C. C. 395.

To compete with the longer circuitous routes used by shippers for such "roller" traffic, railroads, such as appellant, having the shorter direct routes must render a transportation service which is slower than they normally accord traffic not requiring such longer transit time.

Establishment and maintenance at the same tariff rates, fares and charges, by appellant and other railroads of fast, slow or different speeds of freight train schedules and services, adjusted for competition with competing lines and routes of railroad, and to the marketing and distribution needs of patrons, is a practice that has always prevailed in competitive railroad transportation operations in the United States.

Union Pacific, having a shorter, if not the shortest, transcontinental railroad route, has provided, from time to time during at least the past 20 years, for such "roller" traffic requiring such longer time in transit a service designated as "SMX," an abbreviation meaning "slow manifest service."

While the complaint in this case has singled out "roller" lumber traffic, the fact, as stated in the district court's Finding 12, is that appellant's slow service has always "applied to the movement of both perishable and dead freight, including lumber, and all other traffic of any shippers requiring slower than normal service," although "roller" lumber traffic from the Northwest to the East, to which the complaint is limited, constitutes the bulk of the traffic presently using such service. Appellant derives more than $500,000 per month of gross revenues from the lumber traffic involved in this case.

In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These mills did not have any established commercial market, as their production was primarily for war requirements. To remain in business when the war demand ended, it was necessary for these small mills to develop a method of merchandising adaptable

to their operations, and the so-called "roller" or "transit" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through "diversion" or "reconsignment" instructions to the railroad while the shipment is en route.

Most of this lumber moves to markets in the United States east of the Missouri and Mississippi Rivers over the lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes with equal joint rates applicable thereto. The routes so formed vary in length and some of them are much longer than others. For example, the direct route via Union Pacific from Portland, Oregon, to Chicago, Illinois, is 2,259 miles, while routes via other railroads between those points are as much as 1,564 miles longer than the Union Pacific route. From Medford, Oregon, to Joliet, Illinois, the route via Union Pacific is 2,445 miles, while other routes are as much as 1,745 miles longer. From Smith Flat, California, to Chicago, Illinois, the Union Pacific route is 2,232 miles, while other routes are as much as 1,850 miles longer.

As in the case of other "roller" traffic, shippers route "roller" lumber traffic over the longer or more circuitous routes requiring more time in transit, to enable them to find buyers while the shipments are moving eastward; and, in such circumstances, the lumber traffic is lost by the shorter routes, including this appellant's route, because of the longer time in transit utilized by the longer routes.

It is an ironical fact that by granting rate relief from Section 4 of the Interstate Commerce Act for lumber traffic the Commission itself established the long circuitous routes to compete at the same rates with the shorter direct routes, including the route of this appellant, which it now seeks to prevent from competing with those long circuitous routes for the "roller" lumber traffic, *Commodity Rates on Lumber and Other Forest Products*, 165 I.C.C. 561.

Section 1(3) and (a) of Interstate Commerce Act defines the term "railroad" and also defines the term "transportation" as including locomotives, cars and "all instrumentalities and facilities of shipment or carriage," and Section 1(4) makes it the duty of every common carrier subject thereto "to provide and furnish transportation upon reasonable request therefor, * * *."

A railroad's compensation for providing the tracks, cars, locomotives and other facilities used in moving a shipper's goods from place to place and for the actual movement of them is obtained through complying with Section 6(1) of the Act which requires railroads to file and publish tariffs showing "all the rates, fares and charges for transportation" between points on its own route and between points on its route and points on the routes of other railroads.

In other words, the "rates, fares, and charges," which railroads are required to publish in tariffs and collect from shippers, are for *transporting* the shippers' goods, by means and through the use of the railroads' tracks, cars, locomotives and other facilities, from place to place, and performance of kindred service in connection with such movement.

The Act does not require railroads to publish in tariffs separate or additional rates or charges for the

use of its *tracks, locomotives, cars* or other facilities used in performing the "transportation" which railroads are required to furnish.

Nor does the Act require railroads to publish tariffs showing the schedules or "running time" of their trains, or to "hold out," promise or obligate themselves, through tariff publication or otherwise, to move goods or passengers between places within any particular or specified time, or to move all of their trains at the same speed or within the same "running time" or upon the same schedule; or to publish tariffs naming a special, additional or different charge for running one train, or moving one shipment faster or slower than another.

THE COMMISSION'S PRIMARY ADMINISTRATIVE JURISDICTION

It is noted that, in addition to terminal, storage and icing charges expressly named and required to be published in tariffs, Section 6(1) requires railroads to publish "all other charges which the Commission may require." This clearly makes it the primary administrative duty and jurisdiction of the Commission—and not the judicial function of the courts—to determine what "other" charges, if any, should be separately stated and published in tariffs, and to issue its order, rule or regulation accordingly.

But the Commission has never exerted that primary administrative jurisdiction to order or require railroads to specify in their tariffs separate, special or additional rates or charges for the use of their tracks, locomotives, cars or other facilities used in transporting shippers' goods; or to publish in tariffs the schedules or "running time" of their trains; or to run one train or move one shipment of goods no slower or faster than

another, or to publish a separate, additional or special charge for slower or faster movement of passengers or goods; or to prevent Union Pacific or any other railroad from readjusting the "running time" or schedule of its trains in efforts to compete with other railroads, or to meet the requirements of commercial marketing and distributing methods for slow, fast or "normal" movement of goods.

Neither the Union Pacific nor any other railroad files or publishes, or has ever filed or published tariffs naming any such rates or charges, or setting forth or containing any such information as that described in the last preceding paragraph hereof, nor has the Commission required or suggested such publication.

Notwithstanding the foregoing facts and circumstances—particularly the fact that appellant files with the Commission, collects and retains for its slow lumber service the rates specified in published tariffs for transporting lumber and any and all other traffic of any shippers, and the further fact that there is no provision of law or any order, rule or regulation of the Commission expressly prohibiting railroads from performing either a normal or a slower than normal service for the same tariff rate, nor expressly requiring railroads to specify in their tariffs the speed or time to be consumed in performing either normal or slower than normal transportation service, or to publish and collect an extra charge for a slower than normal service—the complaint herein, filed December 23, 1957, alleges that appellant's performance of slow service in transporting lumber "without charge and not pursuant to specific tariff provision" constitutes the giving of concessions and discriminations in respect to the transportation of property whereby appellant transports lumber at less rates than those stated in its

published tariffs in violation of the Elkins Act, and the granting of privileges and facilities not specified in the tariffs in violation of Section 6(7) of the Interstate Commerce Act.

As stated in the district court's Finding 31, after the complaint was filed, several other railroads which, like appellant, had been and now are offering and performing slower than normal service in transporting lumber, filed tariffs with the Commission offering to perform without extra charge in addition to published tariff rates a slow service in transporting lumber the same as appellant's slow lumber service. Such tariffs were filed by the following railroads:

Minneapolis, St. Paul & Sault Ste. Marie Railroad Company

Chicago, Burlington & Quincy Railroad Company

Chicago, Milwaukee, St. Paul & Pacific Railroad Company

Chicago and North Western Railway Company

Chicago, Rock Island and Pacific Railroad Company

Illinois Central Railroad Company

By order dated October 27, 1958, the Commission suspended all of said tariffs until June 1, 1959, Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points*, and instituted its own investigation to determine the "lawfulness" of the suspended tariffs "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant" and to include in such investigation "all matters

and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act."

The Commission has conducted public hearings at Portland, Oregon, and New Orleans, Louisiana, in its investigation, and is due to issue its decision, findings and order by June 1, 1959.

By leave of court appellant amended its answer to the complaint herein and its motion for summary judgment, submitting copies of said tariffs and setting forth the facts showing that the Commission had instituted its own investigation to make its administrative determination concerning the "lawfulness" of the same slow service in transporting lumber which the complaint prayed the court to find unlawful and to enjoin appellant from performing. Appellant, thereupon, prayed for dismissal of the complaint on the ground that the basic and fundamental questions raised by the complaint were within the Commission's primary administrative jurisdiction and were basically the same as the questions to be determined by the Commission in its investigation of the same subject.

Although it correctly held that "it is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved," the district court refused to dismiss the complaint, and held that appellant's slow lumber service is a device to give "rebates, concessions, advantages and discriminations in violation of the Elkins Act," whereby the lumber shippers obtain transportation at less than the published tariff rates, and whereby privileges and facilities not specified in published tariffs are granted to lumber shippers in violation of Section 6(7) of the Interstate Commerce Act.

The court entered an "Order Granting Summary Judgment" for the United States of America, and an "Order Granting Injunction" which permanently enjoins appellant from—

> "* * * extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

However, upon appellant's application for a stay pending this appeal, the district court has stayed and suspended the injunction until October 23, 1959.

THE QUESTIONS ARE SUBSTANTIAL

1. The district court held:

> "It is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved. Perhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes. * * * "

The court further, in its Finding 31, recites the fact that after the complaint was filed in this case several railroads (not including appellant) filed tariffs with the Commission offering to perform without extra charge a 15-day slow or delayed service in transporting lumber and that the Commission, in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points*, suspended those tariffs and instituted its own investigation "into and concerning the lawfulness of the regula-

tions contained in said schedules with a view to making such findings and orders in the premises as the facts and circumstances shall warrant."

Thus, the initial question in this case is whether the district court erred in refusing to apply the rule of primary jurisdiction reiterated and applied by this Court in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Director General v. Viscose Co.*, 254 U. S. 498; *Far East Conf. v. United States*, 342 U. S. 570; *Boston & Maine Railroad Co. v. United States*, —— U. S. ——, 79 S. Ct. 107, and other cases, and thereupon, to dismiss the complaint.

Notwithstanding its recognition of the Commission's primary administrative jurisdiction to determine whether appellant's slow service is reasonable, and the fact that the Commission now has that very question under consideration for decision, the district court seemed of opinion that the rule of primary administrative jurisdiction had no application because the Elkins Act expressly empowered the court to issue an injunction upon its own finding that appellant's slow service in transporting lumber constitutes "a device for the offer and gift of rebates, concessions, advantages and discriminations." This, we submit, clearly reflects the court's misunderstanding of the primary administrative jurisdiction rule. As stated more than 50 years ago by this Court, it is not the duty or function of courts to decide disputed question that are "peculiarly within the province of the Commission," and when such questions arise it is the duty of the courts "to remand the case to the Commission to enable it to perform that duty." *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444.

The district court stated that the Interstate Commerce Commission has already administratively decided that appellant's slow lumber service is in violation of

Section 1 of the Elkins Act and Section 6(7) of the Interstate Commerce Act and has requested the Attorney General to direct the District Attorney to institute this case. The complaint does not allege that the Commission has so decided or that it requested the Attorney General to institute the suit, but even if it did, this would not constitute a performance by the Commission of its administrative function to hold hearings and make a determination upon all of the facts whether appellant's slow service violates any provision of the Act. The Commission has made no such determination with respect to appellant's slow lumber service. It did issue its Service Order No. 910, because of an acute freight car shortage, effective June 13, 1956, to December 8, 1956. The order prohibited all railroads from delaying the movement of loaded freight cars during the car shortage, but made no determination whether appellant's slow lumber service violated any law. See *Railroad Operating Regulations for the Movement of Loaded Freight Cars*, 298 I. C. C. 371.

The complaint and the decision below apparently proceed upon the theory that appellant's offering and performing both a slow and a normal service for all shippers alike for the same published tariff rates without describing or specifying the slow service in published tariffs and without making an extra charge for it renders the slow service, *ipso facto*, a violation of Section 6(7) of the Act and Section 1 of the Elkins Act.

The ultimate allegation in the complaint that appellant's slow service is unlawful is a mere conclusion of the lawyers who wrote the complaint drawn from their basic allegations that appellant's slow service is a device whereby "advantages" are given and "discriminations are practiced"; that the slow service without tariff publication is an unlawful extension of "privileges and fa-

cilities"; that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages," in "additional need for power and working crews," in "excessive per diem cost" to appellant to the "economic disfavor of appellant" and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber." Appellant's answer denies those allegations; and whether they are true or false depends upon findings of fact derived from evidence setting forth detailed and probative facts in particularity.

It is clear from the basic allegations of the complaint and the broad scope of the suspension order dated October 27, 1958, that the Commission's own investigation embraces and "covers the dominant facts alleged in the present case as constituting a violation" of the Interstate Commerce Act and the Elkins Act, *United States Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 483.

For example the real basic and fundamental questions in both the case at bar and in the Commission's investigation are: whether the published tariff rates admittedly collected and retained by appellant are "just and reasonable" for both the fast and the slow service performed by appellant, and that is a question of fact for the Commission's determination under Section 1(5) of the Act; whether appellant's performance of both services at the same published tariff rates and charges is just and reasonable "practice," and that is a question of fact for the Commission's decision under Sections 1(6) and 15(1) of the Act; whether, in performing both fast service and slow service for all shippers alike at their re-

quest, for the same published tariff rates and charges, appellant may be deemed guilty of "unjust discrimination," and that is a question of fact for the Commission's decision under Section 2 of the Act; whether performance of both fast and slow services for all shippers alike for the same published tariff rates and charges causes an "undue and unreasonable preference or advantage" or any "undue or unreasonable prejudice or disadvantage," and that is a question of fact for the Commission's decision under Section 3 of the Act; and whether the slow service at published tariff rates for all shippers alike, but without description of the service in the published tariffs, in fact, constitutes "privileges" not specified in the tariffs within the prohibition of Section 6(7) of the Act, and that is a question of fact for the Commission's decision under Section 6(1) of the Act, which requires railroads to publish "all other charges which the Commission may require."

That such questions are administrative and not judicial in character is clearly shown by the fact that 36 years ago the Commission, in *Transportation of Strawberries by Express*, 81 I. C. C. 634 (1923), conducted an investigation as to whether freight train schedules and service for movement of strawberries from the South to Northern markets were adequate and whether faster service should be ordered. It found, page 644, that "present service is inadequate so far as the time of transportation is concerned" and that "the present schedule should be materially shortened." In a further report, rendered in 1929, involving the same problem, 151 I. C. C. 553, the Commission found that "present freight service for the transportation of strawberries * * * is inadequate" and that the railroads should establish express refrigeration service for movement of berries from the South to Northern markets. In a still further report in that proceed-

ing, 156 I. C. C. 4, the Commission ordered schedules that would provide "third morning" delivery to certain named Northern markets and "fourth morning" delivery to other Northern markets.

In none of the Commission's three reports is there any suggestion that the faster or expedited service should be published in tariffs.

That such problems are administrative and not judicial in nature is further indicated by provisions of the Interstate Commerce Act, Section 1(10), which defines "car service" as including:

> "* * * the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter."

Section 1(14) (a) authorizes the Commission, after hearing upon complaint or its own initiative, to "establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad * * *"

Section 1(15) empowers the Commission upon finding that there is a shortage of equipment, congestion of traffic or other emergency requiring immediate action, to issue orders remedying the situations which cause the emergency. As pointed out above, the Commission exercised that power in dealing with the very subject matter involved in this suit, upon finding that "an acute shortage of freight cars exists" and by issuing its Service Order No. 910, which prohibited railroads from delaying the movement of loaded freight cars "for the purpose of increasing the time in transit." The Order was vacated by

the Commission December 8, 1956, apparently because the shortage of freight cars no longer existed, thus removing any justification for prohibiting delayed movement of loaded cars for the purpose of increasing the time in transit.

Section 6(1) of the Act provides that railroads shall file tariffs publishing "rates, fares and charges for transportation" as therein specified, "and all other charges which the Commission may require." While appellant does not concede that the last quoted words authorize the Commission to require railroads to publish in their tariffs "delayed service" or any other type of service performed in moving traffic at tariff rates, or any special or extra charges for box cars or trackage used in different types or speeds of service, appellant submits that those words demonstrate beyond doubt that the courts are not to be burdened with such matters, and that, if there is authority anywhere to require tariff publication of operating schedules, or extra charges for slow, fast or different types of services, box cars, trackage and other facilities used in performing the service, such authority is left to the administrative discretion of the Commission. But the Commission, during the 72 years of its existence, has never undertaken to determine, prescribe or require that railroads must file and publish tariffs specifying train operating schedules, time of movement of traffic, slow or fast service, or separate and additional charges for different speeds or types of service; use of box cars, trackage or other facilities.

The situation here is practically identical to that in the *Cunard* case *supra* (284 U. S. 474), in which the complaint, brought to enjoin alleged violations of the anti-trust laws. was dismissed on the ground that the matters complained of were within the exclusive administrative

jurisdiction of the United States Shipping Board, under the Shipping Act of 1916. In that case a group of steamship lines by agreement among them charged a low rate to shippers who agreed to ship all of their traffic via the lines of the group but charged the regular and twice higher tariff rate to shippers who would not agree to ship all their traffic via the lines of the group. This and other concerted activities of the group were alleged to be in violation of the anti-trust laws. Significantly, the carriers in that case charged two types of rates (low contract and high tariff) for the same service, while in the case at bar appellant charges one and the same rate for two types (slow and fast) service. This Court conceded that the complaint in that case stated a cause of action and furnished ground for an injunction under the anti-trust laws "unless the Shipping Act stands in the way" (page 480), but held at page 485 that:

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions; or are so interrelated with such charges as to be, in effect, a component part of them; *and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws.* Compare Keogh v. C. & N. W. Ry. Co., supra, 260 U. S. at page 162, 43 S. Ct. 47, 49, 67 L. Ed. 183. The matter therefore is within the exclusive preliminary jurisdiction of the shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, is demonstrative of this conclusion. * * *" (Italics Added.)

In *United States v. Trucking Co.*, 310 U. S. 344, at pages 352-353, this Court held:

> "'It is not disputable that from the beginning the very purpose for which the Commission was cre-

ated was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.' [Citing, *United States v. Louis. & Nash. R. R.*, 235 U. S. 314, 320.]

"* * * The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' *And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.*" (Italics added.)

As neither the Interstate Commerce Act nor the Elkins Act expressly prohibits or condemns as unlawful the performance of either a slow service or a fast service for the same rate or charge, and since appellant admittedly collects and retains the full published tariff rate for both types of service, its slow service may *not*, like a "rebate" [which both Acts expressly prohibit], be condemned as "a thing *ipso facto* illegal and prohibited by the statute," *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, 261; and, since the "legal quality" of the slow service has not—like a rebate or refund to a shipper of a part of the tariff rate—been "definitely fixed by the statute," so, performance of the slow service, "otherwise permissible is lawful or unlawful, according as it is reasonable or unreasonable," or, in fact, brings about a "discrimination," "advantage" or some other result which the Commission determines to be prohibited by the Act.

Having exercised its exclusive administrative jurisdiction under Section 15(7) of the Act to suspend and

refuse to permit the tariff provisions of other railroads, *infra*, page 11, offering slow or delayed service from becoming effective, the Commission *must* now, under the corollary command of Section 15(7), proceed to conduct a "hearing" concerning the "lawfulness" of the slow or delayed service proposed by the suspended tariffs; and, "after full hearing," the Commission must make such "decision" and "order" as the facts and circumstances shall warrant. If its decision is that the slow service is "unlawful," its order will direct that the suspended tariff provisions be cancelled and the proceedings discontinued. If its decision is that the slow service is "lawful," its order will vacate the suspension order of October 27, 1958, and discontinue the proceedings, thus permitting the tariffs to become effective, and the carriers to perform the slow service. In the latter event, appellant herein will need only to publish its slow service in tariff form, which it would do immediately. Or, the Commission may come forth with some "middle-ground" ruling or regulation.

Since the Commission's final decision of the questions raised by its suspension of tariffs publishing slow or delayed service will be the result of consideration, by the only tribunal having exclusive administrative jurisdiction of railroads subject to the Interstate Commerce Act, of "all matters and issues with respect to the lawfulness of the said schedules [the practice of railroads performing slow or delayed service without extra charge] under the Interstate Commerce Act," whatever order, rule or regulation the Commission issues or lays down should serve as a guide and apply uniformly to all railroads subject to the Act on the question whether they may lawfully, with or without tariff publication and an extra charge, perform two types of service, namely, a slow or delayed service and a fast or "normal" service for the same published tariff rates.

All of the cases cited above, *infra*, page 3, reiterate and apply the rule of primary administrative jurisdiction discussed at length in the *Cunard* case. In the *Boston & Maine* and *Far East* cases the court proceedings were ended by dismissal because the further administrative proceedings would result in orders by the Commission and the Board, respectively, which orders would be subject to special judicial review, thus rendering further proceedings by the Court in the cases before it futile and useless. Likewise, in the case at bar, the Commission's investigation which it has ordered concerning the "lawfulness" of the tariffs it has suspended will result in a decision and orler, rule or regulation by the Commission which will also be subject to special judicial review.

In *Director General of Railroads v. Viscose Co.*, 254 U. S. 498, this Court said at page 504:

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated * * *." [citing numerous cases.]

2. The district court's decision is ambiguous and confusing. Disregarding its correct findings of fact that appellant offers and performs both a normal and a slower than normal transportation service for *all traffic* and *all shippers* alike at the same published tariff rates which it collects and retains in full for either service; that appellant has not selected or acted secretly with any particular shippers in offering and performing slower than normal service and that appellant offers and performs the slower service in order to compete with the longer routes that consume more time in transporting "roller" traffic, the district court erroneously concluded that the slower service for lumber shippers, *ipso facto*, constitutes a device for giving "rebates, concessions, advantages and discrim-

inations in violation of the Elkins Act" whereby lumber shippers obtain transportation "at less than the published rates on file" with the Commission, and "privileges and/or facilities" not specified in published tariffs, in violation of the Elkins Act and Section 6(7) of the Interstate Commerce Act.

Notwithstanding these positive holdings that the slower service violates specific statutory provisions, the court says it "wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable"; that it is the function of the Commission "to determine whether or not a delay in service is reasonable under all the facts and circumstances involved"; that "[p]erhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes"; and that "[w]hat this Court is holding is that any intentional delay in service offered by defendant must be published in tariff form," so that the Commission can "determine if such delay is reasonable or unreasonable under the circumstances."

Thus, although refusing to follow the rule of exclusive primary administrative jurisdiction laid down by this Court, and, thereupon, to dismiss the complaint and remand the problem to the Commission, and though holding that the slow lumber service violates specific statutory provisions, the court disclaims it is holding that the slow service is "unreasonable" [which clearly means "unlawful"], holds that it is the Commission's function to determine whether the slow service is unreasonable, but insists that appellant must file a tariff publishing the slow service so that the Commission can determine whether the service is reasonable or unreasonable.

The court then permanently enjoins appellant from performing the slow service for lumber shippers "unless and until" there is "in force" with respect to appellant, a tariff lawfully on file with the Commission naming the rates and charges for such service, despite the fact that appellant already has "in force" and on file with the Commission a tariff naming the rates and charges for transporting lumber, but not specifying the slow service (or the transit time of any service) or any extra charge for it, and despite the fact, recognized by the court, that the Commission now has under suspension for determination of their lawfulness, the tariffs of six other railroads publishing offers to perform the same slow service those railroads and appellant are now performing, but which the district court enjoins appellant from performing.

Only this Court can dissipate the ambiguity and confusion in the district court's decision.

3. There is no statutory provision, nor has the Commission during the 72 years of its existence issued any order, rule or regulation expressly requiring that railroads publish and file in tariff form the operating schedule of their trains or the time within which they propose to move traffic over their lines, or which prevents railroads from operating some of their trains and moving some shipments slower or faster than others, or which requires railroads to operate all of its trains or move all shipments at equal speeds or running time, or which requires railroads to make separate, special, additional or different charges for moving some shipments faster or slower than others or for use of box cars in which shipments are stored and protected while in course of movement, or for the use of trackage and other facilities used in performing the transportation service for which they collect the published tariff line-haul freight rates. It is essential not only to appellant but to all railroads and

shippers that this Court decide whether publication of such information and charges in tariff form, as ordered by the district court, is required by law.

4. It is important to appellant and other railroads having shorter routes that this Court decide whether they are prevented from augmenting their services, including the transit time of shipments over their lines, in order to compete for "roller" traffic with longer circuitous railroad routes unless, as held by the district court, they must defeat their efforts to compete for such traffic by publishing higher or extra rates and charges for performing competitive slow or delayed service.

5. The substantiality and the importance of the questions presented is indicated by the fact that appellant, as pointed out above, realizes more than $500,000 per month—more than $6,000,000 annually—from the lumber traffic involved in this case, practically all of which it would lose if, as required by the district court, it must publish an extra charge for its slow service, thus making the total freight charges for equivalent transit time higher over its routes than over the routes of the longer, circuitous lines.

CONCLUSION

We submit that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 8th day of June, 1959, I served copies of the foregoing Jurisdictional Statement on the adverse party, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Roy L. Stephenson, Esq.
United States Attorney
202 U. S. Court House
Des Moines, Iowa

John C. Stevens, Esq.
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Des Moines, Iowa.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Daniel M. O'Donoghue, Esq.
Attorney
Bureau of Inquiry and Compliance
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
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